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In The

Supreme Court of the United States

TOLLIS, INC., and 1560 N. MAGNOLIA AVE., LLC,

Petitioners,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition For A Writ Of Certiorari
To The Ninth Circuit
United States Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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The County's opposition ("Opposition," or "Opp.") contains detailed and elaborate discussions of issues that are simply not raised by way of this petition. Moreover, in setting forth its points the County has mischaracterized a number of the arguments made by these Petitioners. Most importantly, however, is the fact that the County's Opposition simply fails to address these critical issues of the petition:

1) Who has the burden of satisfying Justice Kennedy's proportionality test as set forth in his concurring opinion in *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002)?

2) What burden must be met to satisfy that standard?

3) Was that test component ever analyzed, let alone resolved, in the proceedings below?

4) How can adult uses be constitutionally relegated to zoning districts that *preclude virtually all other commercial retail activities*?

5) Can general attributes of commercial activities (noise and traffic) be used to constitutionally preclude only "adult" businesses in the commercial areas of an unincorporated County?

Each of these matters will be discussed below.

I. THE COUNTY MISCHARACTERIZES THE PETITIONERS' ARGUMENTS REGARDING THE UNCONSTITUTIONALITY OF ORD. 9469.

While the County spends a great deal of time discussing its contention that Petitioners were not denied a "reasonable opportunity to relocate" under the "alternative avenues of communication standard" of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Opp., pp. 8-11), such an argument is simply not dispositive of this petition. What is relevant here is the question of how Justice Kennedy's proportionality test fits within the constitutional framework used to evaluate the validity of the challenged Ordinance, and whether relegating "adult" uses to industrial areas, *which preclude virtually all other commercial retail enterprises*, satisfies the constitutional standards under *Renton* of providing a "reasonable opportunity to open and operate" an adult use. 475 U.S. at 54.

Initially, the County argues that Petitioners believe that Justice Kennedy's concurring opinion in *Alameda Books* "overrule[s]" the holding in *Renton*. Opp., pp. 9-10, n.6. Petitioners raise no such argument. Rather, they assert that Justice Kennedy's proportionality test (examining "how speech will fare" when subjected to the challenged regulation) requires a constitutional analysis *separate and distinct* from the "alternative avenues of communication" test as set forth in *Renton*. The reasons that these tests are different are set forth in Section V, *infra*. It is for this

reason that the County is simply incorrect when it contends that once the "potential availability" of 68 sites for adult businesses was established, "no further analysis was necessary...." Opp., p. 10.

Petitioners' point is that neither the County nor the lower courts considered any evidence whatsoever as to the impact on the quantity and accessibility of speech (535 U.S. at 450 (Kennedy, J., concurring)) by requiring adult entertainment businesses to relocate to remote industrial zones. Nor did they analyze whether, in view of Justice Kennedy's opinion, the challenged Ordinance "has the purpose *and effect* of suppressing secondary effects" (*id.*), particularly when the Ninth Circuit rested its decision upon the purported governmental interests of traffic and noise; both of which are general attributes of *all* successful commercial endeavors.

These concerns are heightened by the fact that the County's interrogatory answers acknowledge – irrespective of its protestations to the contrary – that fewer citizens visit industrial zones (and would therefore bc less likely to patronize the Petitioners' establishment) and that common sense, under the particular factual circumstances here, substantiate that to be the case. *See*, Section III, *infra*.

The end result is the clear possibility of reduced availability and access to sexually oriented, but constitutionally protected, speech. The courts below were required to analyze this question, and the County was required to carry its burden in this

regard. Neither did, which demonstrates that further direction by this Court of these admittedly confusing standards is warranted.

II. PETITIONERS DO NOT ADVOCATE BRIGHT-LINE RULES.

Contrary to the arguments of the County, the Petitioners advance no "bright-line" rules in this area. Opp., p. 11. Rather, Petitioners demonstrated that different courts, facing the same factual circumstances, come to differing conclusions as to whether content-correlated adult zoning regulations pass First Amendment muster. Rather than seeking bright-line rules, Petitioners seek merely clarity and direction since the absence of a cohesive, uniformly applicable standard continues to produce confusing and conflicting opinions as the lower courts grapple with these issues and apply variants of the *Renton/Alameda Books* tests.

In addition, the County's arguments demonstrate the point made in the petition (pp. 23-26) that these amorphous standards engender result-oriented manipulation. The petition asserts that when the percentage of land available for adult uses becomes so infinitesimally small, government proponents of such legislation merely alter the denominator of the calculation in order to come to a more facially acceptable percentage. The County has done just that in the Opposition, when it deletes for consideration all of the unincorporated areas of the

County that "cannot be developed for any purpose...." Opp., pp. 11-15. Rather, the County contends that the denominator should comprise only of lands zoned for commercial and industrial use. Yet, adult uses are now *banned* in commercial districts, and "generic" commercial businesses are similarly prohibited in the industrial zones where adult uses are allowed.

The lack of direction from this Court permits governments (as was and is the case here) to simply "make up" any figures in an effort to justify the constitutionality of these speech-restrictive laws. The current chaotic state of affairs will continue until this Court clarifies the standards that are to be utilized by the lower courts.

III. IN THIS PARTICULAR CASE, THE INDUSTRIAL ZONES ARE NOT SUITABLE LOCATIONS FOR ADULT BUSINESSES.

In *Renton*, this Court makes clear that while adult businesses are not to be given preferential treatment in regard to zoning, they are to be treated on an equal footing with equivalent land users. 475 U.S. at 54 (adult businesses "must fend for themselves in the real estate market," and are not entitled to "obtain sites at bargain prices"). The problem here is that while industrial areas are not *per se* antithetical to fair adult use zoning, in these particular circumstances the County acknowledges that its manufacturing districts are inappropriate for the

establishment of retail businesses because such uses are *barred* in those areas.

As Petitioners previously pointed out, the County's intention in isolating their business to an industrial zone is to, admittedly, reduce the chances that people will frequent that establishment. App. 240, 242, 244, 246, 247, and 250. Simply put, industrial zones are not, here, suitable for commercial enterprises. On the other hand, the attributes of commercial zones make them viable locations for retail enterprises generally, including proximity to other commercial businesses frequented by potential patrons. If a business is forced into an industrial area with nothing but factories and warehouses that don't draw customers – as is the case here – it is fair to assume that there will be a sharp decline in the number of patrons who would frequent that facility. However, as Justice Kennedy held, this is improper. *Alameda Books*, 535 U.S. at 450.

IV. THE COUNTY MISCONSTRUES PETITIONERS' ARGUMENT REGARDING THE NINTH CIRCUIT'S CONCLUSIONS.

Contrary to the assertions in the Opposition (Opp., pp. 17-19), Petitioners do not attempt to argue that the Ninth Circuit held there were insufficient numbers of sites available in the unincorporated County. What Petitioners find troublesome is that the appellate court stated that ***even if*** there were insufficient sites available within the unincorporated

County, areas "outside the territory governed by the ordinance in question" could be considered in that evaluation. App. 14. As stated in the petition (pp. 35-37), this illustrates the slippery slope down which the secondary effects doctrine is traveling and sets a dangerous precedent worthy of this Court's review.

V. THE COUNTY FAILS TO ADDRESS JUSTICE KENNEDY'S PROPORTIONALITY TEST IN ITS ARGUMENTS.

While the County asserts that Ord. 9469 was enacted to address adverse secondary effects (Opp., pp. 19-20), it fails to respond to the key issue of whether, in the circumstances here, this Ordinance satisfies Justice Kennedy's proportionality test as set forth in his *Alameda Books* concurrence. Rather, the County argues, and the Court of Appeals seems to agree, that so long as the "alternative avenues of communication" standard in *Renton* is satisfied, the proportionality test is definitionally met as well. However, in analyzing Justice Kennedy's opinion, it is clear that the two standards are not the same.

Justice Kennedy posits an example to demonstrate his point. Because the ordinance at issue in *Alameda Books* prohibited "mixed" use adult businesses, "[o]ne business will either move elsewhere or close. The city's premise cannot be the latter." 535 U.S. at 451 (Kennedy, J., concurring). Consequently, the "premise" that the government must forward is that the adult businesses "will for the most part

disperse rather than shut down." *Id.* He then states that the question must then be asked as to whether there is significant evidence to support that contention. *Id.* Justice Kennedy then concludes that the proposition may assume that – in regard to the specific zoning ordinance there – *two percent* of the customers may decide not to travel to the separate businesses because they have been "discouraged by the inconvenience of the separation – a relatively small cost to speech." *Id.* at 452.

These comments demonstrate that the County's arguments cannot carry the day. First, Justice Kennedy's analysis *assumes* that the businesses will be able to successfully relocate, but that speech may nevertheless be impermissibly (and, thus, constitutionally) affected simply as a result of the mandated "inconvenience" to the patrons. Here, there is nothing to presume that adult uses will not be adversely affected and, in fact, the statements of the district court belie such a conclusion. As quoted by the County on page 20 of its Opposition, the district court found that "many industrial businesses are closed at night when adult entertainment businesses are busiest." Consequently, in order to satisfy the proportionality test proposition in *this case*, one would have to assume that patrons would not be dissuaded to visit a *virtually deserted* industrial area of the unincorporated County *at night*, and that the dissemination of speech and expression would not then be impacted. Such a conclusion would, even if made, defy credulity.

Second, neither the County nor the lower courts made any such proposition. Simply put, there was no analysis made below (and the County certainly never presented any evidence in support of its burden to demonstrate) as to how "speech would fare" in light of the enforcement of Ord. 9469.

Third, even if such a proposition would have been made, the Petitioners are still entitled to challenge the same at trial. *Alameda Books*, 535 U.S. at 453 (Kennedy, J., concurring) ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny"). Here, these Petitioners were afforded no such opportunity and, to the contrary, summary judgment was entered *against* them.

These circumstances well demonstrate that further direction from this Court is warranted.

VI. THIS COURT NEEDS TO CLARIFY WHEN, AND EVEN WHETHER, A MUNICIPALITY IS REQUIRED TO IDENTIFY THE PURPORTED NEGATIVE SECONDARY EFFECTS A REGULATION IS SUPPOSEDLY AIMED AT REDUCING.

Petitioners demonstrated that lower courts cannot agree upon when, and even whether, a municipality needs to rely on secondary effects information when enacting speech-restrictive laws. Petition, pp. 19-22. The County does not attempt to reconcile these irreconcilable decisions, and if First Amendment

scrutiny is to have any teeth whatsoever in this area of jurisprudence, there must be further clarification on this point in order to ensure that a challenger has a legitimate opportunity to "cast direct doubt" upon a municipality's rationale for these types of regulations. *Alameda Books*, 535 U.S. at 438-439.

If the government can create "new" governmental interests at any time in the judicial process, the ability to mount such a challenge becomes a nullity as the target is ever-moving. For example, here (and as will be discussed in the section immediately below), the preambles to the County's Ordinance (App. 170) did not even hint at the obscure effects of "noise and traffic" as being purported grounds to enact Ord. 9469.

VII. SAN DIEGO COUNTY CANNOT JUSTIFY THE ENACTMENT OF ITS ADULT BUSINESS ORDINANCE BASED UPON THE CONCERNS OF "NOISE AND TRAFFIC."

Faced with the arguments that the Petitioners have raised, the Respondent has combed through the legislative record in regard to the enactment of Ord. 9469 in search of any morsel of documentation regarding the concerns of noise and traffic. The references that it has found are so fleeting and unremarkable that: a) neither noise nor traffic are listed as issues of concern in the preambles which discuss the underlying concerns that the County felt justified the enactment of the Ordinance; b) they are

not cited by the district court as a basis for its ruling; and c) they are not referenced in the appellate court ruling either.

Nevertheless, the County cites to *Mitchell v. Commission of Adult Entertainment*, 10 F.3d 123 (3rd Cir. 1993), which, admittedly, is listed as a supposed "relied upon" judicial decision in the ordinance preambles. Yet, reliance upon *Mitchell* demonstrates the folly of the County's argument here and bolsters the concerns raised by the Petitioners that the ill-defined secondary effects doctrine provides the proverbial slippery slope down which this area of jurisprudence is heading in order to permit the pretextual suppression of disfavored expression.

In *Mitchell*, the Court noted that Senator McBride, the sponsor of the legislation, noted that one of the concerns observed in re-writing adult legislation approximately ten years earlier had been the circumstance of where adult businesses "abut residential communities," and that such establishments had become "an absolute nuisance to the community in the form of additional traffic...." *Id.* at 134. This, it was argued, justified the enactment of the hours of operation restriction that was at issue in *Mitchell* "so that the neighborhoods can get some peace and quiet at least part of the day." *Id.* at 134-135.[1]

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[1] The other references to the legislative record cited by Respondent similarly concern the circumstance of an adult use

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First, the zoning provisions that the Petitioners had to comply with at the time they first established their business *already* required adult uses to be located away from sensitive uses, including residential areas. *See,* Petition, p. 3, n.1. Consequently, Ord. 9469 cannot be based upon the necessity of reducing noise in residential areas since adult uses were *already* segregated from those districts.

Second, whereas *Mitchell* uses the concerns of noise and traffic to justify the enactment of an hours-of-operation restriction of adult uses, the Petitioners are also subject to a similar type of regulation which was enacted upon these same purported concerns of noise and traffic. *See*, Petition, p. 8, n.10.

Third, the County does not even attempt to respond to the point that all commercial uses create noise and traffic to some extent, particularly if they are successful businesses, and that there was nothing in the record, and no logical basis to believe, that substituting a non-adult retail bookstore establishment in place and instead of the Petitioners' facility

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abutting residential property. *See, e.g.*, S.E.R. 658-659 (survey of real estate professionals asked their subjective opinion as to the impact that an adult entertainment business "located in their neighborhood" would have); S.E.R. 711 (police department had received complaints of excessive noise in the "adjoining neighborhood"); S.E.R. 1162-1163 (summary of New York report discussing "adult establishments in various neighborhoods"); and S.E.R. 1613 (study analyzing "neighborhoods containing sex-related businesses").

would in any way reduce noise and traffic in a commercial zoning district.[2]

Fourth, *Mitchell* also mentions, just as obliquely, the issue of "parking problems." *Id.* at 136. Yet, the County never raised this "concern" as a justification for the enactment of the Ordinance, even though this problem was articulated in *Mitchell*. So, how were the Petitioners to know which of the various concerns fleetingly mentioned in this legislative record – regardless of how briefly – it would be required to challenge if those matters were not articulated as specific governmental concerns of *San Diego County*?

Finally, as it asserted in its interrogatory answers, the County reiterates that it "was only required to produce evidence that adult businesses are responsible for excessive noise and traffic, not that requiring adult businesses to be located in industrial zones will actually reduce noise and traffic in commercial areas." Opp., p. 24 n.11. But such a contention flies in the face of both the majority precedent of this Court as well as Justice Kennedy's concurring opinion in *Alameda Books*.

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[2] While the County contends that the Petitioners did not challenge the finding concerning "noise and traffic" on appeal (Opp., p. 24), they devoted six and one-half pages in their Ninth Circuit appeal brief to arguing, and demonstrating, that there was an absence of a significant governmental interest in the enactment of the challenged Ordinance. Appellants' Opening Brief, pp. 38-44.

In *Renton*, this Court stated that adult zoning laws would be declared constitutional if they were "designed to *serve* a substantial government interest...." 475 U.S. at 47. This language certainly indicates that a speech-restrictive law must actually, at least to some extent, "work." *See also United States v. O'Brien*, 391 U.S. 367, 377 (1968) (under intermediate scrutiny, a speech-restrictive law will be constitutional if, among other things, it "*furthers* an important or substantial government interest") (emphasis added).

Justice Kennedy's concurring opinion in *Alameda Books* is no different. "[A] city ***must advance some basis to show*** that its regulation has the ***purpose and effect*** of ***suppressing secondary effects***." *Alameda*, at 449-450 (Kennedy, J., concurring) (emphasis added). By the County's own admission, it failed to do this and more particularly failed to demonstrate that relegating adult uses solely to the industrial areas of the unincorporated county would advance the governmental interests of reducing noise and traffic in the commercial areas of the County.

CONCLUSION

For the reasons set forth herein and in their Petition for a Writ of Certiorari, Petitioners respectfully request that this Honorable Court grant the petition.

Dated: May 13, 2008

Respectfully submitted,

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